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No. ____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.; and
DAVID SWANSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal sentencing guidelines are applicable under circumstances where the defendants were convicted of an ongoing offense initiated before the guidelines went into effect, but acquitted of all alleged criminal activity occurring after the effective date of the guidelines.

2. Whether the imposition of a two level increase for obstruction of justice is warranted pursuant to Section 3C1.1 of the federal sentencing guidelines where a defendant's use of an alias was neither intended to impede, nor actually resulted in any hindrance to, the administration of justice.

3. Whether the imposition of a four level increase pursuant to Section 3B1.1 of the federal sentencing guidelines for the role in the offense is appropriate based solely upon a defendant's status as an officer of the co-defendant corporations and absent specific findings regarding the size of the criminal organization and the defendant's degree of responsibility therein.

4. Whether the evidence adduced at trial is sufficient to sustain a corporate defendant's conviction for conspiracy to transport obscene material through interstate commerce where the substantive counts in which it was charged and the overt acts alleged in furtherance of the conspiracy did not involve obscenity, but rather, established only an agreement to transport constitutionally protected speech material.

[**Note:** Petitioner Swanson reserves the right to argue Question 5 on the merits in the event certiorari is granted, but does not include Question 5 among the reasons for granting certiorari.]

5. Whether the evidence adduced at trial is sufficient to sustain a defendant's convictions where the government failed to establish the defendant's involvement in any alleged criminal activity beyond his status as a corporate officer of the co-defendant corporations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

COME NOW the Petitioners, ABC, Inc., d/b/a ABC Books[1], General Video Midwest, Inc.[2], and David Swanson, by and through their attorneys, and hereby petition this Honorable Court to issue a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Eighth Circuit in the above-entitled action.

1 Petitioner ABC, Inc., d/b/a ABC Books, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Supreme Court Rules.

2 Petitioner General Video Midwest, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Supreme Court Rules.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported to date, but is reprinted in the Appendix to the Petition for a Writ of Certiorari (hereinafter "Appendix"), at App. 1. The order denying a Petition for Rehearing and Suggestion for Rehearing En Banc is also reproduced in the Appendix, at App. 32.

JURISDICTION

Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on April 26, 1991, which affirmed Petitioners' convictions entered by the United States District Court for the District of Nebraska on April 30, 1990. *See* Appendix, App. 1. Thereafter, a timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 3, 1991. *See* Appendix, App. 32. This Petition for Certiorari was filed within ninety days thereof.

The Eighth Circuit's decision is a final judgment since it affirmed the district court's judgment which was final within the meaning of 28 U.S.C. Section 1291. Jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit in this criminal action is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The pertinent portions of Title 18 U.S.C. Sections 371 and 1462, together with the relevant provisions of the *Federal Sentencing Guidelines Manual*, Sections 2G3.1, 3B1.1 and 3C1.1, promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. Section 994, are set forth verbatim in the Appendix hereto, at App. 35-App. 52.

STATEMENT OF THE CASE

In or about April, 1987, the Lincoln Police Department, in conjunction with the Federal Bureau of Investigation, initiated an investigation into the interstate transportation of allegedly obscene material in Lincoln, Nebraska. The target of the investigation in the instant case was "Cinema X," an adult establishment located in the City of Lincoln. Cinema X is owned and operated by Petitioner ABC, Inc., a foreign corporation licensed to conduct business and doing business in Nebraska. Petitioner David Swanson was president of said corporation and Steve Brooks, a former co-defendant, was employed by ABC, Inc. as the manager of Cinema X.

The Lincoln Police Department instigated its covert investigation of Cinema X on or about April 10, 1987. During the course of the investigation, from April 1987 until May 1988, Officer Jerry Lowe of the Lincoln Police Department periodically patronized Cinema X in an undercover capacity. Throughout the period of the investigation, Officer Lowe rented a total of 12 videocassette tapes. Each of the videotapes selected by Officer Lowe was a special order not regularly stocked in the store. Several of these videotapes were ordered for Officer Lowe, by Brooks, from Petitioner General Video Midwest, Inc. General Video Midwest is an Illinois corporation of which Swanson was also an officer. Notably, only three of the twelve videotapes rented by Officer Lowe were actually purchased and selected for prosecution in this case.

At the conclusion of the investigation, a four count indictment was filed in United States District Court for the District of Nebraska against Petitioners, as well as former co-defendant Brooks, on January 31, 1989.

Jurisdiction was conferred upon the district court pursuant to 18 U.S.C. Section 3231. Count I of the indictment charged the two corporations and the two individuals with conspiring to transport obscene material in interstate commerce in violation of 18 U.S.C. Section 371. Counts II and IV charged each of them with substantive offenses involving the use of an express company or other common carrier to transport obscene material in violation of 18 U.S.C. Section 1462. Count III charged only Petitioners ABC, Inc. and Swanson, along with Brooks, with an additional substantive offense involving the violation of 18 U.S.C. Section 1462.

Prior to trial, Brooks entered into a plea agreement with the Government. Pursuant to the agreement, all of the charges pending against Brooks in the instant case were dismissed and he agreed to cooperate in testifying as a witness for the Government in the trial of the Petitioners herein.

A jury trial was commenced on December 18, 1989, the Honorable Warren K. Urbom presiding. At trial, Brooks testified that the videotapes selected by Officer Lowe were not regularly stocked in the store and had to be special ordered. At no time did Swanson participate in perfecting these special orders. Officer Lowe corroborated Brooks' testimony, stating that at no time did he recall hearing Swanson's name mentioned in connection with the ordering or shipping of the subject videotapes.

At the conclusion of the Government's case, Petitioners' motion for a judgment of acquittal on the basis of insufficient evidence was summarily denied by the trial court. Subsequent renewals of this motion were similarly denied. *See* Appendix, App. 6. Petitioners were

convicted of Counts I and III of the indictment and acquitted of all remaining counts. However, the trial court vacated the conviction as to General Video Midwest on Count III because it was not charged in that count of the indictment. *See* Appendix, App. 7.

On April 27, 1990, Petitioners were sentenced under the Sentencing Reform Act of 1984, over their objection that the federal sentencing guidelines were inapplicable to Petitioners' offenses of conviction because they had been acquitted of all alleged criminal activity occurring after the effective date of the guidelines. *See* Appendix, App. 10. Overruling their objection, the trial court sentenced the Petitioner corporations accordingly, assessing a fine against ABC, Inc. in the amount of $60,000 as to each of the Counts I and III, and discharging it as to the remaining counts of which it was acquitted. *See* Appendix, App. 23. General Video Midwest was fined $80,000 as to Count I, and discharged as to the remaining counts. *See* Appendix, App. 25. In sentencing Petitioner Swanson, the trial court increased Swanson's guideline range by four levels pursuant to Section 3B1.1 of the federal sentencing guidelines for role in the offense based upon Swanson's status as president of the convicted corporations. *See* Appendix, App. 10. The court further enhanced Swanson's guideline range by two levels pursuant to Section 3C1.1 for obstruction of justice based upon his use of an alias. *See* Appendix, App. 10. Accordingly, Petitioner Swanson was sentenced to a 24-month term of imprisonment on each of the Counts I and III, to run concurrent as to each count. In addition, the trial court ordered Swanson to pay a fine in the amount of $46,861.71, and discharged him as to the remaining counts of which he was acquitted. *See* Appendix, App. 27. The final orders of judgment were entered on April 30, 1990. *See* Appendix, App.23 - App. 31.

Petitioners appealed their convictions to the United States Court of Appeals for the Eighth Circuit. On April 26, 1991, the Eighth Circuit affirmed Petitioners' convictions and sentences in all respects. *See* Appendix, App. 1. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on June 3, 1991. *See* Appendix, App. 32. However, the Eighth Circuit granted Petitioners' motion to stay the issuance of the mandate pending the filing of the within Petition. *See* Appendix, App. 33 - App. 34.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL SENTENCING GUIDELINES ARE NOT APPLICABLE UNDER CIRCUMSTANCES WHERE THE DEFENDANTS WERE CONVICTED OF AN ONGOING OFFENSE INITIATED BEFORE THE GUIDELINES WENT INTO EFFECT, BUT ACQUITTED OF ALL ALLEGED CRIMINAL ACTIVITY OCCURRING AFTER THE EFFECTIVE DATE OF THE GUIDELINES

Pursuant to 28 U.S.C. Section 994, the United States Sentencing Commission promulgated detailed guidelines prescribing sentences for offenders convicted of federal crimes. The federal sentencing guidelines took effect automatically on November 1, 1987, and are applicable to offenses committed thereafter. *See* 18 U.S.C. Section 3551. As a general principle of law, the guidelines are also applicable to certain ongoing offenses initiated before November 1, 1987, but continuing in existence after that date. In *United States v. Walker*, 885 F.2d 1353 (8th Cir. 1989), for example, the Eighth Circuit held that since conspiracy is a continuing offense, the trial court

may sentence a conspirator under the sentencing guidelines for a conspiracy that was formed before the guidelines took effect, *if* the conspiracy continued after the effective date of the guidelines. *See also*, *United States v. Lee*, 886 F.2d 998 (8th Cir. 1989). Under such circumstances, application of the sentencing guidelines cannot be said to violate the *Ex Post Facto* Clause of the United States Constitution. *United States v. White*, 869 F.2d 822, 826 (5th Cir.), *cert.den.*, 490 U.S. 1112 (1989).

However, the issue in the instant case is whether the sentencing guidelines are applicable to a conviction for conspiracy to transport obscene material initiated *before* November 1, 1987 and which, by virtue of the jury's unequivocal findings, terminated no later than August 3, 1987, months *before* the guidelines took effect. Specifically, Count I of the indictment alleged a conspiracy among Petitioners from "April 10, 1987 and continuously thereafter until. . . May 12, 1988. . . ." Nine overt acts were alleged to have been committed in furtherance of the conspiracy. The first seven acts allegedly occurred no later than August 3, 1987, *before* the guidelines took effect. The only two overt acts alleged to have taken place *after* November 1, 1987 were those acts which served as the basis for the substantive offense charged in Count IV of the indictment, of which Petitioners were acquitted.

More particularly, the last two overt acts allegedly committed in furtherance of the conspiracy alleged that on or about May 12, 1988, a videocassette tape entitled "Bi-Heat Vol. 10" was delivered to Steven Brooks, who, in turn, sold the videotape to an undercover officer in violation of 18 U.S.C. Section 371. Moreover, the *only* substantive count that occurred after the effective date of the guidelines was Count IV, which specifically charged, *inter alia*:

B. The above violation was committed and carried out in the course of and in furtherance of the conspiracy set forth in Count I of this Indictment, while the defendants named therein were members of the conspiracy.

The jury found Petitioners not guilty of Count IV, thus, specifically rejecting the Government's express allegation that the acts charged in Count IV were "carried out in the course of and in furtherance of the conspiracy set forth in Count I. . . ." The trial court, nevertheless, ruled that the conspiracy continued after the effective date of the sentencing guidelines.

Contrary to the Eighth Circuit's decision in the instant case, the fact that the jury rejected the Government's allegations that the last two overt acts were illegal and part of the conspiracy is crucial. In an analogous case, the Ninth Circuit found that a defendant convicted of voluntary manslaughter, but acquitted of first degree murder, should not have been sentenced on the basis of the district court's finding that the defendant's conduct exhibited an intent to kill or do serious bodily harm, stating:

> We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. . . . A sentencing court should not be allowed to circumvent th[e] statutory directive [that voluntary manslaughter is less serious than murder] by making a finding of fact—under any standard of proof—that the jury has necessarily rejected by its judgment of acquittal. *United States v. Brady*, 928 F.2d 844, 851 (9th Cir., March 18, 1991).

In the instant case, too, the jury's determination that Count IV, encompassing the two above-referenced overt acts, was not illegal and not part of the conspiracy, should not be circumvented by the trial court's subsequent finding that the conspiracy continued after August, 1987.

Moreover, the Eighth Circuit's decision in this case is contrary to *United States v. Davis*, 718 F. Supp. 8 (S.D.N.Y. 1989), where the court determined that the sentencing guidelines did not apply to a conspiracy which began before November 1, 1987 and continued after November 1, 1987, where the *bulk* of the criminal activity alleged took place before the effective date of the guidelines. The instant case is far more compelling than *Davis*. Unlike *Davis*, *all* of the alleged criminal activity was found by a jury to have occurred prior to November 1, 1987. In addition, unlike *Davis* where the defendants were *convicted* of a substantive count involving overt acts occurring after November 1, 1987, Petitioners herein were *acquitted* of the only substantive offenses alleged to have occurred after November 1, 1987.

Equally as important is the fact that the alleged conspiracy charged in the instant case involved speech material presumptively protected by the First Amendment. As eloquently articulated by the Sixth Circuit in *United States v. Peraino*, 645 F.2d 548 (6th Cir. 1981):

> The *general rule* that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, *e.g.*, *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir.), *cert. denied*, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), *does not control when First Amendment rights are at stake*. In most cases the illegal purposes

> of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards. *Id.*, at p. 551-552 (emphasis added).

As such, the government must prove "that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film." *Id.*, at p. 552.

Overlooking the distinctions enunciated by the Sixth Circuit in conspiracy cases implicating First Amendment rights, the Eighth Circuit in this case ruled that even though Petitioners herein were found *not* to have engaged in any criminal activity subsequent to November 1, 1987, the guidelines were still applicable because other acts, although not criminal, were committed by them after that date. *See* Appendix, App. 1. However, the conspiracy alleged in Count I specifically charged that Petitioners conspired to ship three *obscene* videotapes in interstate commerce. Only one of those films was found to be obscene and, hence, the remaining two films were implicitly found by a jury to be protected speech material under the First Amendment. Therefore, *any* activity subsequent to the date of the shipment involving the single *obscene* film, in order to be *in furtherance of an agreement to transport obscene material*, would be dependent upon proof that material shipped after November 1, 1987 was, in fact, *obscene*. Otherwise, the activity would constitute overt acts in furtherance not of an unlawful agreement, but of a perfectly proper agreement to transport constitutionally protected speech material.

However, pursuant to the Eighth Circuit's reasoning, taken to its logical conclusion, as long as Petitioners were in the business of distributing any presumptively protected filmfare, *all* of their actions would be considered in furtherance of an agreement to ship *obscene* material by virtue of *one* film that was shipped on July 30, 1987 having been declared obscene. Such a result would make one sale of an obscene film a restraint upon any later sales involving any speech material, contrary to this Court's decision in *Universal Amusement v. Vance*, 445 U.S. 308 (1980). Thus, contrary to the Eighth Circuit's decision, unless and until any acts of Petitioners taken after November 1, 1987 were taken in furtherance of an agreement to transport a film that has been adjudicated *obscene*, those actions cannot be said to have been taken in furtherance of an agreement to transport obscene material. Therefore, these acts could not be considered as activity extending the existence of the conspiracy charged in Count I past the effective date of the guidelines.

Based upon the foregoing arguments and authorities, it is clear that the Eighth Circuit's decision in the instant case is contrary to the decisions of numerous other federal courts and, further, is violative of Petitioners' fundamental rights of freedom of speech as guaranteed to them by the First Amendment to the United States Constitution. Moreover, the Eighth Circuit's decision gives rise to crucial implications involving constitutional constructions of the *Ex Post Facto* Clause, as it relates to the sentencing guidelines, which have not yet been addressed by this Honorable Court. Therefore, the within Petition should be granted by this Court.

II.

THE IMPOSITION OF A TWO LEVEL INCREASE FOR OBSTRUCTION OF JUSTICE PURSUANT TO SECTION 3C1.1 OF THE FEDERAL SENTENCING GUIDELINES IS NOT WARRANTED WHERE A DEFENDANT'S USE OF AN ALIAS WAS NEITHER INTENDED TO IMPEDE, NOR ACTUALLY RESULTED IN ANY HINDRANCE TO, THE ADMINISTRATION OF JUSTICE

Section 3C1.1 of the federal sentencing guidelines provides for a two level increase of the offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense ... ." *See* Appendix, App. 40. Jurisdictions have been divided over the question of whether such an increase of the offense level is warranted when a defendant provides an alias to government officials during the course of his criminal proceedings.

In *United States v. Wilson*, 887 F.2d 576 (5th Cir. 1989), *per curiam*, 904 F.2d 234 (1990), the Fifth Circuit held that such an increase for use of an alias was improper in the absence of evidence that the defendant willfully impeded or obstructed the administration of justice, or attempted to do so. However, the Eighth Circuit, holding to the contrary, has determined that a two level increase for obstruction of justice may be appropriate under those circumstances. *See e.g., United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990) [affirming district court's two level enhancement of sentence for the defendant's use of an alias regardless of whether there was actual prejudice to the government].

In an effort to clarify for sentencing courts the applicability of the obstruction of justice enhancement, the Federal Sentencing Commission issued proposed amendments to Section 3C1.1 which automatically went into effect on November 1, 1990. In light of the amendments, it becomes abundantly clear that it was not the Commission's intent to increase a defendant's offense level for obstruction of justice based upon the use of an alias. Specifically, the Sentencing Commission announced that "providing a false name or identification document at arrest, except where such conduct *actually* resulted in a significant hindrance to the investigation or prosecution of the instant offense does not warrant an enhancement for obstruction of justice." *See, Federal Sentencing Guidelines Manual*, Section 3C1.1, Application Note 4(a) (Nov. 1990), reprinted in Appendix hereto, at App. 40 (emphasis added).

In the instant case, the trial court increased Petitioner Swanson's offense level by two levels purportedly for giving an alias to government officials at the time of his arrest and during the course of the proceedings. However, the trial court made absolutely *no* factual findings that Swanson's use of an alias constituted a material falsehood intended to impede or resulting in a hindrance to the Government's investigation or prosecution of this case. *See* Appendix, App. 10.

Although it is technically true that Petitioner Swanson's birth name is Michael Elmer Mohapp, what the trial court failed to consider is the fact that Petitioner has used the name "Swanson" for approximately 25 years and, therefore, certainly was not utilizing that "alias" for the purpose of attempting to impede the administration of justice. To the contrary, Swanson *voluntarily*

surrendered in the instant case when the indictment was returned, and perhaps more importantly, *all* of Petitioner's criminal history utilized to calculate his guideline range was listed under the name of "Swanson." In fact, the Government was fully aware of Petitioner's true identity and that the purpose for his utilizing an "alias" was to begin a new life following his horrifying experiences in Viet Nam which were similar to those experiences which caused countless Americans to desert or flee to other countries, but for whom amnesty was subsequently granted. *See* Appendix, App. 10. Clearly, Swanson's use of an alias was not intended to impede the administration of justice, nor did it actually hinder the judicial process in any way.

On appeal, the Eighth Circuit recognized that the commentary to Section 3C1.1 directly contradicts its prior holding in *Blackman*. However, because Petitioner Swanson's sentence of 24 months straddles the guideline range, the Court regarded the issue as nonappealable and, contrary to numerous other circuit courts, refused to review the matter. *See* Appendix, App. 1.

Specifically, in the instant case, the trial court's two level increase for obstruction of justice increased Swanson's offense level from a level 15 to a level 17. This enhancement increased the sentencing range from 18-24 months to 24-30 months. The 24-month sentence imposed by the trial court, therefore, falls within the ranges specified for both offense levels.

In *United States v. Bermingham*, 855 F.2d 925, 934 (2nd Cir. 1988), the Second Circuit engaged in a lengthy and detailed discussion concerning the appealability of overlapping sentences. The general rule articulated by the Court is that "disputes about applicable guidelines

need not be resolved where the sentence falls within either of two arguably applicable guideline ranges *and* the same sentence would have been imposed under either guideline range." *Id.*, at p.934 (emphasis added). However, a situation in which the trial court sentences a defendant at the low end of the sentencing range for the applicable offense level, presents an exception to this general rule, absent evidence that the sentence would have been the same regardless of which sentencing range was ultimately determined to be appropriate. *Id.*[3] "In such situations, it obviously matters which guideline range is applicable, and a judge entertaining such a view could not conscientiously be satisfied that the same sentence would have been imposed simply because it happened to fall at or near the high end of a lower, overlapping guideline range." *Id.*, at p.935.

On the face of the record in the instant case, certainly it cannot be said that the sentence imposed by the trial court against Petitioner Swanson would have been the same under *either* guideline range. To the contrary, the trial court intentionally sentenced Swanson at the low end of the guideline range for the offense level applied so as to distinguish his conduct from more heinous crimes. *See*, Appendix, App. 10.

The foregoing authorities conclusively demonstrate that the Eighth Circuit's decision concerning the issue of a sentencing enhancement for obstruction of justice

[3] The Eighth Circuit's refusal to review guidelines issues involving overlapping sentences where the defendant was sentenced at the low end of the sentencing range for the offense level applied is directly contrary to numerous other federal appellate court decisions. *See e.g., United States v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990); *United States v. Williams*, 891 F.2d 921 (D.C. Cir. 1989); *United States v. McCrary*, 887 F.2d 485 (4th Cir. 1989); and *United States v. Vasquez*, 874 F.2d 250 (5th Cir. 1989).

based upon the use of an alias is directly contrary to law and conflicts with the decisions of other federal appellate courts. The Eighth Circuit's further refusal to review Petitioner Swanson's challenge to the applicable guidelines range also conflicts with numerous other federal appellate court decisions and is violative of Petitioner's rights of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, the within Petition should be granted.

III

THE IMPOSITION OF A FOUR LEVEL INCREASE PURSUANT TO SECTION 3B1.1 OF THE FEDERAL SENTENCING GUIDELINES FOR ROLE IN THE OFFENSE IS INAPPROPRIATE WHEN BASED SOLELY UPON A DEFENDANT'S STATUS AS AN OFFICER OF THE CO- DEFENDANT CORPORATIONS AND IN THE ABSENCE OF SPECIFIC FINDINGS REGARDING THE SIZE OF THE CRIMINAL ORGANIZATION AND THE DEFENDANT'S DEGREE OF RESPONSIBILITY THEREIN

Chapter 3B of the *Federal Sentencing Guidelines Manual* permits a sentencing court to adjust the offense level to accurately reflect a defendant's relative culpability based upon his role in committing the offense. More particularly, Section 3B1.1 allows the court to increase the offense level proportionately based upon a determination of whether the defendant was an "organizer or leader" or "manager or supervisor" in criminal activity that "involved five or more participants or was otherwise extensive." *See* Appendix, App. 38.

Although the sentencing guidelines were promulgated, at least in part, to promote uniformity in sentencing, the application of the adjustment for role in the *offense* has varied depending upon the court's interpretation of the term "offense." The District of Columbia and numerous other circuit courts have adopted the plain meaning of the term "offense" as referring to the "offense of conviction."[4] *See, United States v. Williams*, 891 F.2d 921, 925 (D.C. Cir. 1989) [requiring the sentencing court "to look at the defendant's role in the offense of conviction, not his role in any relevant aggravating conduct in which he may have engaged."] A minority of courts, however, interpret the term more broadly to include both the conduct of conviction and all relevant conduct. *See e.g., United States v. Fells*, 920 F.2d 1179 (4th Cir. 1990).

The Sentencing Commission recently amended the guidelines to conform to this latter interpretation. However, the Third Circuit refused to apply the amendments to offenses committed prior to November 1, 1990 because it was uncertain whether they were intended to clarify the earlier language which it found unambiguous, or to change the guidelines. *See, United States v. Murillo*, 933 F.2d 195 (3rd Cir., May 8, 1991). Consequently, the Third Circuit adopted what it termed a "middle ground" approach. Pursuant to the Third Circuit's approach, in determining role in the offense for offenses committed prior to November 1, 1990, a sentencing court "should look both to the acts or omissions of the defendant that satisfied the specific elements of the offense of conviction

[4] Other federal appellate courts adopting the D.C. Circuit's interpretation of the term "offense" in ascertaining whether an adjustment is appropriate based upon a defendant's "role in the offense," include: *United States v. Zweber*, 913 F.2d 705 (9th Cir. 1990); *United States v. Petit*, 903 F.2d 1336 (10th Cir.), *cert. den.*, ___ U.S. ___, 111 S.Ct. 197, 112 L.Ed.2d 159 (1990); and *United States v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990).

and to those that brought about the offense of conviction. . . ." *Id.*, at pp. 199-200, *accord*, *United States v. Manthei*, 913 F.2d 1130 (5th Cir. 1990).

In light of this division among the circuits, the trial court's failure to make adequate findings of fact to support its four level increase in the instant case becomes particularly acute. Based upon an examination of the record in the instant case, it is impossible to determine what conduct of Petitioner Swanson was considered in increasing his offense level for role in the offense.

Specifically, the trial court in the instant case made virtually no findings concerning Swanson's actual role in the interstate transport of the single videotape the jury determined to be obscene, nor did the court make any findings concerning the size or scope of the criminal activity in the shipment of the videotape. Certainly the interstate shipment of one obscene videotape ordered by a police officer does not, in and of itself, constitute extensive criminal activity sufficient to warrant a four level increase. A single violation of law committed by a corporation engaged in the otherwise lawful business of selling presumptively protected speech materials (as determined by the jury) should not render the entire business an extensive criminal enterprise.

Moreover, the trial court failed to make a specific finding as to whether Swanson was an "organizer or leader" under Section 3B1.1(a), nor did the court attempt to distinguish Swanson's role in the criminal activity from that of a "manager or supervisor" as set forth in Section 3B1.1(b). *See*, *United States v. Lanese*, 890 F.2d 1284, 1293 (2nd Cir. 1989); and *United States v. Silverman* 889 F.2d 1531, 1540 (6th Cir. 1989) [both remanded for findings of fact on number of participants under Section 3B1.1]. The trial court's failure to make specific findings is

particularly troublesome in the instant case because the evidence at trial established that Swanson had absolutely nothing to do with the ordering, shipping, receiving, or selection of *any* videocassette tapes, let alone the single videotape that was actually determined to be obscene. Further evidence established that Swanson only came to the store three times a year, and was only actually observed on the premises on one occasion during the course of the year-long investigation.

The trial court apparently based the four level increase solely on the fact that Swanson was president of the two corporations. *See* Appendix, App. 10. However, the mere fact that Swanson held the title of president is not sufficient to establish that he was a member of a conspiracy. *See, United States v. American Grain & Related Industries*, 763 F.2d 312, 318 (8th Cir. 1985). Furthermore, given the specific distinctions contained in Section 3B1.1, surely the title of president, standing alone, is insufficient to justify a four level increase. This is strongly confirmed by Application Note 3 of the commentary to Section 3B1.1 which lists the factors to be considered in determining a defendant's role and expressly states that titles are "not controlling" in "distinguishing a leadership or organizational role from one of mere management or supervision." *See, Federal Sentencing Guidelines Manual*, Section 3B1.1, Application Note 3 (Nov. 1990), reprinted in Appendix hereto, at App. 38. Notably, however, the trial court in the instant case wholly failed to consider even one of the factors listed in imposing the maximum increase. Indeed, no evidence was introduced to establish that Swanson had a significant role in the activities that formed the basis for the convictions in Counts I and III.

The trial court also failed to make any specific findings as to whether the criminal activity "involved five or more participants or was otherwise extensive." Section 3B1.1, Application Note 1, defines "participant" as "a person who is *criminally responsible* for the commission of the offense, but need not have been convicted." *See, Federal Sentencing Guidelines Manual*, Section 3B1.1, Application Note 1 (Nov. 1990), reprinted in Appendix hereto, at App. 38, (emphasis added). Courts have strictly construed the definition of "participant" in determining role in the offense. *See e.g., United States v. Carroll*, 893 F.2d 1502, 1511 (6th Cir. 1990); and *United States v. Fuller*, 897 F.2d 1217 (1st Cir. 1990). In the instant case, there was no finding that Swanson's criminal activity relating to Counts I and III involved any other persons criminally responsible for the conduct. Although the indictment identified Steven Brooks as a participant in the alleged offenses, no evidence was introduced, nor any findings made, concerning the role of any other participants involved in the shipping of any videotape, much less than transport of the single videotape determined to be obscene.

As noted in the commentary to Section 3B1.1 of the federal sentencing guidelines, "the section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e. the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense." *See* Appendix, App. 38. Application of the *maximum* four level increase in the instant case is wholly contrary to the Sentencing Commission's intent where there was no extensive criminal organization involved in

the shipping of one obscene videocassette tape, and where the Petitioner had no responsibility for the commission of the offense other than holding a corporate title.

Based upon the division among the circuits concerning the interpretation of the term "offense" in determining whether an adjustment is appropriate for a defendant's role in the offense, and the lack of findings in the record to support a four level increase of Petitioner Swanson's offense level in the instant case, the within Petition should be granted by this Court.

IV.

A CORPORATE DEFENDANT'S CONVICTION FOR CONSPIRACY TO TRANSPORT OBSCENE MATERIAL THROUGH INTERSTATE COMMERCE CANNOT BE SUSTAINED WHERE THE SUBSTANTIVE COUNTS IN WHICH IT WAS CHARGED AND THE OVERT ACTS ALLEGED IN FURTHERANCE OF THE CONSPIRACY DID NOT INVOLVE OBSCENITY, BUT RATHER, ESTABLISHED ONLY AN AGREEMENT TO TRANSPORT CONSTITUTIONALLY PROTECTED SPEECH MATERIAL

The essence of conspiracy is an agreement to commit an illegal act. *See e.g., United States v. Coler*, 583 F.2d 1135 (8th Cir. 1978). Moreover, the general rule is that a conspirator is liable for the acts of his co-conspirators as long as he is a member of the conspiracy. *See e.g., United States v. Cimini*, 427 F.2d 129 (6th Cir.), *cert. den.*, 400 U.S. 911 (1970). However, this general rule "does not control when First Amendment rights are at stake." *United States v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981).

In most federal cases, such as those involving narcotics trafficking, kidnapping, bank robbery and other crimes persons may conspire to commit, the illegal purpose of the conspiracy will be illegal in every federal jurisdiction. However, it is impossible to conspire to violate the federal obscenity statutes without the existence of a specific *obscene* item to transport. Sexually explicit material is not illegal until it is proven obscene. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); and *Roaden v. Kentucky*, 413 U.S. 496 (1973). As such, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards. *United States v. Peraino, supra*, 645 F.2d, at p.551.

In the instant case, Petitioner General Video Midwest was charged and convicted, along with Petitioners ABC, Inc. and David Swanson, of conspiring to use a common carrier to transport obscene material in interstate commerce in violation of 18 U.S.C. Sections 371 and 1462. The only overt acts or "unlawful purpose" alleged in the instant case involved the three videotapes charged in the substantive counts of the indictment. However the jury concluded that the videotapes charged in two of three substantive counts of the indictment were not obscene and, therefore, cannot be illegal objectives of the conspiracy. While the jury found the videotape in the remaining substantive count to be obscene, General Video Midwest was not charged in that count of the indictment. Therefore, by the Government's own admission, as evidenced by its failure to charge General Video Midwest in that count, there was not sufficient evidence linking General Video Midwest to the single obscene videotape either by shipment or agreement. Con-

sequently, there was no showing of any illegal objective to the conspiracy either committed or agreed to by General Video Midwest.

Rather, the most the Government can prove in this case, absent a conviction of General Video Midwest on any substantive count (and absent a showing that General Video Midwest was involved in any illegal objective of the conspiracy such as those alleged in the overt acts of the conspiracy) is that certain persons conspired to ship sexually explicit material, which, in itself, is not a crime. Consequently, the Government failed to show that General Video Midwest agreed to do anything illegal. The videotapes alleged in the two substantive counts in which General Video Midwest was charged, and the overt acts alleged in the conspiracy count were not, in any way, shown to involve obscenity or General Video Midwest. Clearly, General Video Midwest was not involved with any videotapes found to be obscene, and any agreement entered into by General Video Midwest can only be considered an agreement to transport constitutionally protected speech material.

Moreover, the Eighth Circuit seemingly overlooks those few cases in which the combination of substantive obscenity offenses and conspiracy is alleged. In the majority of those cases, the defendants convicted of the conspiracy were also convicted of at least one substantive count. *See e.g., United States v. Cangiano*, 491 F.2d 906 (2nd Cir.) *cert. den.*, 419 U.S. 904 (1974); *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978); *United States v. Marks*, 520 F.2d 913 (6th Cir.), *rev'd on other grounds*, 430 U.S. 188 (1977). *Cf., United States v. Friedman*, 506 F.2d 511 (8th Cir.), *cert. den.*, 423 U.S. 855 (1975). In the single case in which a conspiracy conviction was obtained without a conviction of an obscenity

count, the defendant conceded the materials involved were obscene and the ultimate issue in the case was whether the defendants were involved in the conspiracy. *United States v. Zuideveld*, 316 F.2d 873 (7th Cir.), *cert. den.*, 376 U.S. 916 (1964). "There need not be proof the conspirators were aware of the criminality of their objective, but *knowledge of the commission of the substantive offense must be brought home to them to supply the essential ingredient of intent.*" *Id.*, at 878 (emphasis added).

In the instant case, General Video Midwest was acquitted of all substantive offenses specified as overt acts in the conspiracy count. In addition, only the one videocassete tape was determined to be obscene. Based upon the evidence in this case, General Video Midwest had absolutely nothing to do with that particular videotape. It did not agree that the videotape be sent, nor did it take any steps in furtherance of a conspiracy with respect to the videotape.

Accordingly, the Eighth Circuit's affirmation of Petitioner General Video Midwest's conviction is contrary to the decisions of numerous other federal appellate courts and violative of Petitioner's First Amendment rights of freedom of speech. Therefore, the within Petition should be granted by this Court.

CONCLUSION

Rule 10 of the Supreme Court Rules states that review on a writ of certiorari will be granted only when "special and important reasons" to do so exist. One significant reason for granting certiorari pursuant to Supreme Court Rule 10.1(a) is when a federal appellate court has rendered a decision in conflict with the decisions of numerous other federal circuit courts of appeal on the same matter.

Based upon the foregoing arguments and authorities, the Eighth Circuit's decision in the instant case is in direct conflict with the decisions of numerous other federal courts, particularly with regard to those issues involving the applicability and statutory construction of various provisions of the federal sentencing guidelines. Because the conflicts among the circuits themselves perpetuate the very uncertainties and disparities in sentencing that the guidelines were designed to eliminate, Petitioners respectfully request this Court grant the within Petition for a Writ of Certiorari to review the Eighth Circuit's opinion in this case.

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Respectfully submitted,

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